UNITED NATIONS

AT

Administrative Tribunal

Dist.
LIMITED

AT/DEC/617
3 November 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 617

Case No. 667: DE BRANDT-DIOSO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Hubert Thierry;

Whereas at the request of Irma de Brandt-Dioso, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 15 January and 15 April 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 15 April 1992, the Applicant filed an application inter alia, requesting the Tribunal:

"(a) To find and rule that the New York General Service Classification Appeals and Review Committee (NYGSCARC), as presently established (ST/AI/301) (...), violates the Staff Regulations and Rules, particularly those set out in Chapter XI (...) pertaining to joint appeals board;

...

(c) To find that the basic premise of the classification exercise was violated, namely that the Classification Section pre-determined the Applicant's post to belong to the General Service category, and rule that the Applicant's post be reviewed against established professional standards as well;

(d) To find that the Administration's failure to audit the Applicant's post discriminated against her and thus deprived her of an important part of the classification exercise, ...

(e) To find that, by withholding the findings and recommendations of both the Classification Section and the NYGSCARC the Applicant was denied the opportunity to prepare her appeal in light of those findings and recommendations, ...

(f) To order the Secretary-General to implement the Tribunal's recommendation in the Ibarria case (...) and further rule that the Applicant be provided with all findings, reasonings and rationales related to the classification of her post so as to allow her to present an appeal at a later date;

(g) To find that the Applicant was denied the opportunity to submit her appeal directly to the New York General Service Classification Appeals and Review Committee, as provided for in Joint Appeals Board procedures (...);

...

(i) To find and rule that the Applicant has a right under staff regulation 2.1 to have her functions correctly classified, as emphasized by Tribunal Judgement 388 (Moser) (...), and in addition to correct or clarify staff regulation 2.1 (...) when it says '... shall make appropriate provision for the classification of posts and staff...;

..."

Whereas the Respondent filed his answer on 14 May 1992;

Whereas, on 17 March 1993, the President of the Tribunal requested the Respondent to provide the Applicant "with the analysis by the Compensation and Classification Service referred to in her case as one of the elements considered by NYGSCARC in making its recommendations on the level of the post";

Whereas, on the same date, the Tribunal also asked the Applicant "to advise the Tribunal whether there is any further information that she wishes to be considered, which deals

exclusively with the above analysis and the nature of the duties and responsibilities of the post, as set forth in the job descriptions to which that analysis was directed";

Whereas, on 23 March 1993, the Respondent submitted to the Tribunal the documentation requested and the Applicant, on 30 April 1993, provided her comments thereon, together with replies to the questions put by the Tribunal;

Whereas the Applicant filed written observations on 28 April 1993;

Whereas, on 3 June 1993, the Respondent submitted an additional document;

Whereas, on 15 July 1993, the Applicant submitted additional observations;

Whereas the facts in the case are as follows:

Irma de Brandt-Dioso entered the service of the United Nations on 16 June 1975, on a three month fixed-term appointment at the G-3, step I level, as a Bilingual Clerk in the Training and Examinations Service of the Office of Personnel Services (OPS). Her appointment was extended for further fixed-term periods and on 1 January 1976, she was granted a probationary appointment. On 1 June 1977, she received a permanent appointment and was promoted to the G-4 level, as a Senior Clerk-Typist. On 1 January 1982, the Applicant was promoted to the G-5 level, as an Administrative Assistant and, with effect from 1 October 1984, she was re-assigned within OPS, to the Staff Activities and Housing Unit. The Applicant was promoted to the G-7 level, with effect from 1 October 1985, as Personnel Assistant. The Applicant was temporarily reassigned to the United Nations Transition Assistance Group (UNTAG) in Namibia, from 23 June 1989 through 22 December 1989, and to the United Nations Angola Verification Mission (UNAVEM) in Lusaka, with effect from 1 May 1992 through 5 April 1993. From 1 May through 4 November 1992, the Applicant was paid a special post allowance to the P-2 level, as Electoral Team Leader with UNAVEM II.

In July 1982, the International Civil Service Commission had approved the establishment of a seven-level grading structure (to replace the old five-level structure) for the General Service category in New York and promulgated job classification standards for the seven levels. As a result, all General Service posts in New York were classified under procedures set out in administrative instruction ST/AI/301 of 10 March 1983.

On 28 April 1986, the Assistant Secretary-General, OPS, informed the staff, in information circular ST/IC/86/27, "of the action taken with respect to the classification exercise for posts in the General Service ... categories at United Nations Headquarters and to outline future action, in particular with respect to the implementation of the results of the exercise and the related appeals procedure." NYGSCARC was established with effect from 16 May 1986, to hear appeals against the results of the classification exercise.

A description of the post encumbered by the Applicant was prepared for initial classification and submitted to the Classification Service on 3 September 1986. The job description was reviewed by the Classification Review Panel and classified at the G-6 level.

On 21 January 1987, the Assistant Secretary-General, OPS, informed the Applicant that he had approved this recommendation.

In a memorandum dated 26 May 1987, to the Assistant Secretary-General, Office of Human Resources Management (OHRM[1]), the Applicant appealed the classification decision arguing that her functions were "largely professional in nature".

NYGSCARC reviewed the appeal at its 15th meeting on 17 May 1989 and recommended that the post be upgraded to the GS-7 level.

In a memorandum dated 11 September 1989, the Assistant Secretary-General, OHRM, informed the Applicant that he had approved the recommendation by NYGSCARC. The Applicant was retroactively promoted to the G-7 level, with effect from 1 October 1985.

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[1] Successor of OPS.

On 10 July 1990, the Applicant wrote to the Assistant Secretary-General, OHRM, requesting to meet with him, "to explain the special nature of my functions and professional duties which would call for my post to be classified at a higher level."

Having received no reply, on 24 September 1990, the Applicant wrote to the Assistant Secretary-General, OHRM, who, in a written communication dated 24 April 1991, stated:

> "6. As far as an application to the Joint Appeals Board is concerned, as you may be aware, in accordance with staff rule 111.2, a staff member wishing to appeal an administrative decision, pursuant to staff regulation 11.1, shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such a letter must be sent within two months from the date the staff member received notification of the decision in writing. In view of the specified time-limit, your application for review of the case by JAB is clearly time-barred, considering that you were informed about the outcome of the appeal in January 1990, as per your memorandum of 10 July to [the Assistant Secretary-General, OHRM). The same is true with respect to an application to the Administrative Tribunal. In accordance with information circular ST/IC/86/27 of 3 February 1982 on Internal Resource Procedures in the United Nations Secretariat, an appeal to the Administrative Tribunal can generally be taken only after prior consideration of the matter by a joint appeals board. The application to the Administrative Tribunal must be submitted to its Executive Secretary within 90 days of the communication to the staff member of a negative decision of the Secretary-General following a JAB consideration.
>
> 7. I regret that we cannot be more helpful but, as you could see from the above, all procedures applicable in respect to your case have been scrupulously followed and all means of recourse have been exhausted. Therefore, please be advised that the classification decision allocating the post you encumber to the GS-7 level is to be considered as final."

On 24 June 1991, the Applicant sought the Secretary-General's agreement to submit an appeal from the decision to classify her post

at the G-7 level, directly to the Tribunal, under article 7.1 of the Tribunal's Statute. On 10 July 1991, the Assistant Secretary-General, OHRM, informed the Executive Secretary of the Tribunal that:

> "Under the circumstances of this case, the Secretary-General is of the opinion that submission of the dispute to the New York General Service Classification and Review Committee satisfies the requirement that a dispute be submitted to 'the joint appeals body' set out in article 7, paragraph 1, of the Administrative Tribunal Statute.
>
> Alternatively, the Secretary-General would agree to the direct submission of [the Applicant's] application to the Administrative Tribunal."

On 16 July 1991, the Director, Staff Administration and Training Division, OHRM, informed the Applicant that the Secretary-General consented to the Applicant's request, stating: "the Secretary-General considers that your case satisfies the requirements of article 7 of the Tribunal's Statute."

On 15 April 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The existence and the procedures of NYGSCARC violate the Staff Regulations and Rules and the Applicant's due process rights.

2. The Respondent pre-determined the classification level of the Applicant's post.

3. The Respondent wrongfully failed to conduct a job classification "audit" of the Applicant's post, as required by paragraph 13 of administrative instruction ST/AI/301.

4. The Respondent prevented the Applicant from submitting her appeal directly to NYGSCARC.

5. The Applicant had a right to have her post and her functions correctly classified.

Whereas the Respondent's principal contention is:

The Respondent's discretionary decision with regard to the classification of the level of the Applicant's post was properly taken, following an independent review by a specialized appeals body.

The Tribunal, having deliberated from 21 October to 3 November 1993, now pronounces the following judgement:

I. The Applicant challenges a decision dated 24 April 1991, with regard to action dated 11 September 1989, classifying the Applicant's post at the G-7 level. The decision rejected the Applicant's claim that her post should have been classified at the Professional level. The sequence of events leading to this was as follows: a request for classification of the Applicant's post was made in September 1986. The post was classified at the G-6 level in January 1987, upon the recommendation of the Classification Review Panel, under information circular ST/IC/86/45. The Applicant appealed this decision by a letter dated 26 May 1987. A reply, dated 11 September 1989, informed the Applicant that, upon the recommendation of the New York General Service Classification Appeals and Review Committee (NYGSCARC), her post was being re-classified at the G-7 level. She objected and requested consent for a direct appeal to the Tribunal. By a letter dated 16 July 1991, the Applicant was told that the Respondent considered that her case could properly be presented to the Tribunal under article 7 of the Tribunal's Statute. A letter dated 9 September 1991, from the Director, Staff Administration and Training Division, OHRM, advised the Applicant that the agreement for direct submission to the Tribunal pertained to the 24 April 1991 communication referred to above.

II. The Applicant's pleas ask the Tribunal to determine that (a) NYGSCARC procedures and functions are in violation of article IX of the Staff Regulations and Rules, (b) there was an unlawful predetermination, for budgetary reasons, that the Applicant's post

should be classified in the General Service category, and (c) that there should be an audit of her post before reclassification. She also asks that the Tribunal recommend that all posts on appeal to NYGSCARC be audited. In addition, the Applicant asks the Tribunal to determine that she was denied due process and the opportunity to submit her appeal directly to NYGSCARC, as provided in JAB procedures, and that she was denied rights under staff rule XI. Finally, the Applicant asks the Tribunal to determine her rights under staff regulation 2.1 and to "correct or clarify staff regulation 2.1" in a specified manner. Oral proceedings are also sought by the Applicant. However, the Tribunal concludes that the mate ial before it is adequate for a decision in this case and that there is no need for oral proceedings. That request is denied.

III. The issues in this case are similar to those presented to the Tribunal in Judgement No. 541, Ibarria (1991), and in other post classification cases decided by the Tribunal at its Geneva Session in 1993. In Ibarria, the Tribunal recalled its jurisprudence in Judgement No. 396, Waldegrave (1987), in paragraph XV of which the Tribunal held:

> "It is not the function of the Tribunal to substitute its judgement for that of the Secretary-General in job classification matters. This would be so even if the Tribunal had the required expertise in this area - which it does not. For the most part, the arguments advanced on behalf of the Applicant seek to have the Tribunal determine independently how it would classify the post in question, but this is not the role of the Tribunal. It is instead the function of the Tribunal to determine whether under all the circumstances, the Respondent has acted within his reasonable discretion..."

IV. The same principles govern this case. The Applicant's contentions are aimed largely at persuading the Tribunal that the content of the Applicant's post is such that it should be classified

at the Professional level. As indicated above, the Tribunal will not enter into an evaluation of the elements of the Applicant's job description.

V. As in Ibarria, the Tribunal's concern is with matters such as a denial of due process if the staff member neither sees nor has an opportunity to comment on documentation sent by the service in charge of classification to NYGSCARC. The Tribunal found that the procedure before NYGSCARC did not fully afford the Applicant the possibility of stating her case since documentation furnished to NYGSCARC by the Compensation and Classification Service was not made available to her. She therefore had no opportunity to comment on it. In Judgement No. 541, Ibarria (1991), the Tribunal stated that "... in proceedings before [NYGSCARC] ... both parties should see such recommendation considered by that body."

VI. In order to remedy this omission, the Tribunal, on 17 March 1993, ordered the Respondent to make the documentation in question available to the Applicant. This was done. Her comments, in the view of the Tribunal, present no significant new material which was not previously before NYGSCARC, in either the job description signed by the Applicant, the arguments previously advanced by her in connection with her classification appeal, or in the information submitted to NYGSCARC by the Compensation and Classification Service in its memorandum dated 26 April 1989. The Applicant's comments, dated 30 April 1993, and others submitted thereafter, essentially reiterate all of her previous arguments regarding the alleged professional nature of her job, though some are couched in a slightly different form. What she says, to a large degree, simply reflects judgemental differences between her and the Compensation and Classification Service or NYGSCARC, as to whether her post more closely matches General Service or Professional classification guidelines. But the Tribunal concludes that nothing has been submitted warranting further consideration by NYGSCARC. Although it

might have been desirable for NYGSCARC to have set forth the considerations which caused it to recommend that the post be classified at the G-7 level, the highest in the General Service category, rather than the G-6 level recommended by the Compensation and Classification Service, the Applicant was obviously not injured by her level being raised. Moreover, the Applicant's contentions are not aimed at differences between General Service levels, but at the difference between the General Service and the Professional classifications. NYGSCARC was aware of the Applicant's contentions and obviously did not agree with them. Thus, the procedural flaw mentioned above, which has been corrected, has not had any detrimental effect. The Tribunal holds that the Respondent acted within his reasonable discretion in adopting the recommendation of NYGSCARC.

VII. With respect to the Applicant's contention of unfairness, because there was a predetermination that the Applicant's post belonged to the General Service category, and that this stemmed from budgetary considerations, the Tribunal finds that there is no evidence whatever supporting this contention. The Compensation and Classification Service has specifically denied having made any predetermination. It appears from NYGSCARC's reclassifying as professional some posts that were previously classified in the General Service category, that it did not make predeterminations, much less based them on budgetary considerations. The evidence, in particular the upgrading of the Applicant's post, indicates that NYGSCARC has examined posts fairly and objectively. Hence, the Tribunal rejects this contention by the Applicant.

VIII. With respect to the Applicant's claim that the failure to audit her post discriminated against her, the Tribunal reiterates its determination in Ibarria that the Compensation and Classification Service has discretion as to whether to conduct an audit in any particular case. The Tribunal finds nothing in the

circumstances of this case that would impugn the exercise of that discretion. The Applicant's post was classified on the basis of the job description she signed, as amplified by her submission on appeal, as well as the analysis of the Compensation and Classification Service, which based its views on her job description. The fact that a previous job description of the post had been audited, or that handwritten notes relating to that audit are only partially legible, is immaterial. The conclusion of the Compensation and Classification Service that an audit was unnecessary in this case, was within its discretion.

IX. With respect to the various contentions by the Applicant related to the difference between appeal procedures under Chapter XI of the Staff Regulations governing JAB proceedings and NYSGCARC appeals procedures, under administrative instruction ST/AI/301, the Tribunal reiterates the view stated in Judgement No. 597, Colayco (1993), paragraph X. The present appeal, like Colayco, is before the Tribunal on the basis of the Applicant's request for consent to direct appeal and the letters dated 9 September 1991, and 16 July 1991, referred to in paragraph I of this Judgement. That correspondence expressed a belief by the Respondent that NYGSCARC stood in the same position as a joint appeals board insofar as the jurisdiction of the Tribunal is concerned. That precise question has not previously been decided and need not be decided in this case, in view of the consent to direct appeal.

There are, as has been pointed out by the Applicant, some meaningful differences between NYGSCARC and the Joint Appeals Board. In Ibarria, the Tribunal expressed concern at NYGSCARC's procedures, but found that with the modification discussed in paragraph VIII of that Judgement, they met minimal due process requirements. The Tribunal believes that, if the Respondent wishes to retain a specialized body such as NYGSCARC, which, in advising the Respondent, appears to rely heavily on the views of the Compensation and Classification Service, it would be appropriate for

that body to approximate - in what is essentially an adversarial proceeding - more closely the procedures of the JAB. This would ensure a comparable level of transparency and observance of due process. In the Tribunal's opinion, this ought to lead not only to better informed decisions but would avoid or lessen the delays and need for remand arising from procedural problems.

X. The Tribunal notes that in this case, the independent review and judgement of NYGSCARC led it to conclude, contrary to the Compensation and Classification Service recommendation, that the Applicant's post should be reclassified to the G-7 level, rather than to the G-6 level. The Tribunal also notes that the Applicant's claim of having been denied due process because she did not know the composition of the NYGSCARC Classification Panel lacks merit, as does her contention that she was denied the right to counsel. The membership of NYGSCARC was announced by information circular ST/IC/88/65 dated 21 December 1988. This was sufficient to apprise the staff of the persons who would be considering classification appeals. Moreover, there was no impediment to the Applicant obtaining counsel to advise or assist her in submitting her classification appeal.

XI. With respect to the Applicant's request for a ruling under staff regulation 2.1 that she has a right to have her functions correctly classified, staff regulation 2.1 speaks for itself in requiring the Respondent to make appropriate provision for the classification of posts and staff. This, the Respondent has done in cooperation with the International Civil Service Commission, acting under article 13 of its Statute. There is no occasion in this case for the Tribunal to pronounce on any abstract questions regarding staff regulation 2.1. Moreover, there is no issue properly before the Tribunal in this case which calls upon it to address any alleged inconsistency in the language of staff regulation 2.1.

XII. For the foregoing reasons the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Hubert THIERRY
Member

New York, 3 November 1993

R. María VICIEN-MILBURN
Executive Secretary